BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LUCIEN J. HUTSELL Claimant VS. **WESLEY MEDICAL CENTER** Respondent Self-Insured AND **KANSAS WORKERS COMPENSATION FUND**	)	Docket No. 195,884

ORDER

Respondent appeals from a Preliminary Hearing Order of Administrative Law Judge John D. Clark of March 28, 1995, wherein the Administrative Law Judge granted claimant benefits finding claimant's bilateral carpal tunnel syndrome occurred as a result of an accidental injury arising out of and in the course of claimant's employment, and further finding claimant had provided timely notice to the respondent of the injuries alleged.

ISSUES

(1) Whether claimant suffered accidental injury on the date alleged.
(2) Whether claimant's accidental injury arose out of and in the course of his employment with respondent.
(3) Whether claimant provided notice pursuant to K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board finds the above enumerated issues are issues which are appealable from a preliminary hearing pursuant to K.S.A. 44-534a and as such the Appeals Board has jurisdiction to decide same.

Claimant alleges bilateral carpal tunnel syndrome suffered while employed with respondent. Respondent denies claimant suffered accidental injury arising out of and in the course of employment and further states claimant did not properly provide notice under K.S.A. 44-520 and, as such, was prejudiced as a result of this lack of notice.

The claimant filed an E-1 alleging injury through August 1994. Claimant had been aware of his bilateral upper extremity problems for a significant period of time having been told approximately two (2) years before that he had possible carpal tunnel syndrome. Claimant was diagnosed by Dr. Andersen with possible carpal tunnel syndrome on August 5, 1994. Dr. Anderson recommended nerve conduction studies, which were performed on August 24, 1994, which confirmed the carpal tunnel syndrome diagnosis.

Respondent raises the issue of notice and prejudice alleging that claimant had known about this condition prior to July 1, 1993, which would allow for notice under the old law. K.S.A. 1992 Supp. 44-520 states:

> "Proceedings for compensation under the workmen's compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address for the person injured, shall have been given to the employer within ten (10) days after the date of the accident: *Provided,* That actual knowledge of the accident by the employer or his duly authorized agent shall render the giving of such notice unnecessary: *Provided further,* That want of notice or any defect therein shall not be a bar unless the employer prove that he has been prejudiced thereby."

Had claimant alleged an accidental injury prior to July 1, 1993, the above law would have been applicable. As claimant's E-1 alleges accidental injury through August 1994, notice and prejudice is not the issue to be considered by the finder of fact. K.S.A. 44-520, as amended by the Legislature July 1, 1993, states as follows:

> "Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceedings for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the

> employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

An issue which must be considered by the Appeals Board is whether claimant provided notice within ten (10) days of the date of accident and, failing to do so, whether claimant had just cause for such failure.

Before this issue can be decided the Appeals Board must first decide whether claimant has indeed proven accidental injury arising out of and in the course of his employment. Claimant, a twenty-three and one-quarter (23 1/4) year employee with respondent, had spent eighteen (18) years in the laundry room. This employment was hand intensive, requiring repetitive hand motion on a regular basis throughout the work day. Claimant testified to symptomatology beginning as early as two (2) years before the date of accident with increased and continuous symptomatology throughout that entire time. Claimant, while knowing that he was suffering symptomatology similar to carpal tunnel syndrome, continued to perform his regular duties through his last date of employment on November 7, 1994. Claimant neither requested nor was offered accommodation during this time.

The Appeals Board agrees claimant's bilateral carpal tunnel syndrome was suspected and claimant was fully aware of the condition as early as two (2) years before the date of injury with this diagnosis being confirmed in August 1994, the alleged date of injury. The Appeals Board finds claimant has proven by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment with respondent with the diagnosed condition being bilateral carpal tunnel syndrome.

Next the Appeals Board must decide the date of claimant's alleged injury. Respondent contends claimant's injury preexisted July 1, 1993. Claimant contends his injury occurred in August 1994 when the specific carpal tunnel diagnosis was made. Both arguments fail. The Court of Appeals in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), has established a bright line rule for accidental injury dates when dealing with bilateral carpal tunnel syndrome. The Court of Appeals in Berry, *supra.*, found that the claimant's date of injury in a carpal tunnel situation will be the last day the claimant worked for the respondent. In so ruling, the Court of Appeals dictates the date of injury in this matter to be claimant's last day of employment with respondent, November 7, 1994. Specific notice to respondent of claimant's carpal tunnel syndrome was provided by claimant on September 21, 1994, when an accident report was provided by the company doctor to the respondent. The Appeals Board finds claimant provided notice to the respondent of accidental injury arising out of and in the course of his employment within ten days of the actual date of injury.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark, dated March 28, 1995, is affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of June, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Phillip R. Fields, Wichita, Kansas
Frederick L. Haag, Wichita, Kansas
Randall C. Henry, Hutchinson, Kansas
John D. Clark, Administrative Law Judge
George Gomez, Director